No. 47157-4-II

#94-1-02719-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NGA NGOEUNG,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Stanley Rumbaugh, Resentencing Judge

APPELLANT'S SUPPLEMENTAL BRIEF

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A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The sentence of two consecutive life sentences without the possibility of parole plus 166 months violates the Washington Constitution, Article 1, § 14, under this Court's recent decision in State v. Bassett, __ Wn. App. __, __ P.3d __ (April 25, 2017) (2017WL 1469240).

2. The Court should waive any procedural defects to grant Mr. Ngoeung relief from the unconstitutional restraint he is suffering as a result of a sentence which categorically violates Article 1, § 14, as "cruel" punishment.

3. On remand for resentencing, the Supreme Court's decisions in State v. Houston-Sconiers, __ Wn.2d __, 391 P.3d 409 (2017 WL 825654) and State v. Ramos, 187 Wn.2d 420, 387 P.3d 650 (2017), control.

4. New counsel should still be appointed on resentencing.

B. SUPPLEMENTAL QUESTIONS PRESENTED

1. In Bassett, this Court recently held that a sentence of life without the possibility of parole imposed for a crime committed while under the age of 18 categorically violates the state constitutional prohibition against cruel punishment, regardless of the severity of the crimes.

   Should this Court order resentencing in this case, because Nga Ngoeung was 17 at the time of the crimes, received two consecutive life sentences plus 116 months and received a categorically unconstitutional sentence?

2. Should the Court waive any procedural defects as it did in Bassett under less compelling circumstances and in light of the constitutional right to appeal a sentencing decision in a criminal proceeding?

3. Should the Court's Order of Remand for Resentencing order a full new proceeding at which the recent decisions of our state's highest court apply and new counsel is appointed?

C. SUPPLEMENTAL SUMMARY OF FACTS AND PROCEDURE

Nga Ngoeung was a youth of 17 when, in 1994, he was charged in adult court and convicted of two counts of first-degree murder (in the

alternative) with aggravating circumstances, two counts of first-degree assault with aggravating circumstances and one count of taking a motor vehicle without permission. CP 1-5.

The charges all stemmed from a single incident in late August of 1994, when four high-school age boys threw eggs and other items from their car at some other boys standing outside a house. CP 25-26. The boys outside the home were Oloth Insyxiengmay, who was 15 years old, Soutthanom Misaengsay and Nga Ngoeung, then 17 years old. CP 25-26.

It was Insyxiengmay who, believing the attack was gang-related, ran inside the house and grabbed a rifle. CP 25-26. Insyxiengmay told the others to get into the car, ordering Ngoeung to drive. CP 25-26. It was also Insyxiengmay who put the rifle out the window and shot it at the other car, killing two of the boys inside. Misaengsay was allowed to enter a plea as a juvenile; Insyxiengmay received a little over 72 years in prison. See Insyxiengmay v. Morgan, 403 F.3d 657 (9th Cir. 2005).

Ngoeung, in contrast, was sentenced to serve two consecutive, mandatory terms of life without the possibility of parole, plus an additional 166 months for three consecutive terms for the other offenses. CP 25-26. At a resentencing in 2014, the judge reimposed the same sentence. CP 92-94.

Mr. Ngoeung filed a timely notice of direct appeal and his pending Personal Restraint Petition urging resentencing under Miller v. Alabama, 542 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), was stayed. The proceedings in the direct appeal were stayed sua sponte by the Court pending the decision in Bassett, supra. That decision has now issued.

D. SUPPLEMENTAL ARGUMENT

1. THE SENTENCE IS IN VIOLATION OF THE STATE CONSTITUTIONAL PROHIBITION AGAINST CRUEL PUNISHMENT AND REVERSAL AND REMAND SHOULD BE ORDERED UNDER BASSETT

The legal landscape has changed significantly since the filing of the opening and response briefs in this case. The state Supreme Court issued a decision in State v. Ramos, supra, holding that Miller analysis applies to sentencing for *all* crimes based on the length of the time in total custody, not just based on a single offense. More recently, that Court held that the Eighth Amendment and Miller require that a sentencing judge must have absolute discretion to waive even mandatory flat-time consecutive sentencing enhancements, to impose a sentence as low as "0" for a juvenile crime. State v. Houston-Sconiers, supra.

Following Ramos and Houston-Sconiers, this Court issued the decision in Bassett, supra. This Court should hold that, under that case, the sentence imposed in Mr. Ngoeung's case was in violation of the prohibitions against "cruel" punishment contained in Article 1, § 14 of our state constitution. Further, the Court should waive any alleged procedural bar and treat this case as a personal restraint petition or, in the alternative, find that the constitutional right to appeal enshrined in Article 1, § 22, of our state's constitution guarantees the right to appeal from a resentencing.

Taking the latter issue first, at the outset, this Court should find that the case is not procedurally barred. The state has argued that the "Miller fix" statute providing for the resentencing here only provides a right to appeal based on filing a personal restraint petition. Brief of

Respondent ("BOR") at 7-8. The state has also conceded, however, that waiver of the procedural error of filing a direct appeal instead of a personal restraint petition, and "address the challenge to the setting of the minimum terms on the merits." BOR at 8.

This Court should accept the prosecution's assessment and waive any procedural error here. This issue was addressed in Bassett, which noted that the Miller fix legislation provides a right to appeal a "minimum term" set under RCW 10.95.030 only "to the same extent as a minimum term decision by the parole board before July 1, 1986." Bassett, slip op. at 7; quoting, RCW 10.95.035(3). On July 1, 1986, a minimum term decision was reviewable only by the filing of a personal restraint petition. See In re the Personal Restraint of Rolston, 46 Wn. App. 622, 623, 732 P.2d 166 (1987); Bassett, slip op. at 7. In Bassett, this Court noted this general rule but also that the state had assumed based on previous caselaw that the Court was likely to disregard any filing defect in order to address the merits. Bassett, slip op. at 7-8. The Court then said that, "[i]n order to facilitate review of a minimum term decision on the merits, we may disregard a filing defect and treat a direct appeal as a PRP." Id. It then did so, noting that the state had assumed it would. Id.

Similarly, in this case, to facilitate review of this decision on the merits, the Court should treat this appeal as a PRP or, in the alternative, should treat it as a direct appeal under the constitutional right to appeal a sentence in a criminal proceeding. As in Bassett, the prosecution here assumed this Court would treat the case as a PRP. See BOR at 7. In addition, Mr. Ngoeung filed a PRP well before the appeal in this case, and

that proceeding was stayed several years ago by the Court pending the decision on this appeal. Dismissing the appeal and requiring the proceedings for the PRP to start anew with new briefing will only result in delay for forms' sake.

Mr. Ngoeung, unlike Mr. Bassett, was merely an accomplice, never wielding a weapon of his own. Further, unlike in Bassett, who planned for days, stealing a gun in anticipation and eliciting and scheduling help, the incident here happened on terrible impulse in response to an immediate perceived situation. The facts of Mr. Ngoeung's case and the need to have relief granted are even more compelling than in Mr. Bassett's case.

Notably, the right to appeal from a decision in a criminal prosecution is enshrined in our constitution. Article 1, §22; see State v. Thompson, 93 Wn. App. 364, 368-69, 967 P.2d 1282 (1998). Resentencing is a critical stage of such a prosecution, unless the only acts taken by the resentencing court are "ministerial" and involve no exercise of discretion. See, e.g., State v. Ramos, 171 Wn.2d 46, 49, 246 P.3d 811 (2011). The lower court here exercised its discretion, reviewing evidence and entering a sentence in a criminal prosecution. See, e.g., State v. Toney, 149 Wn. App. 787, 205 P.3d 944 (2009). Although the "Miller fix" statute was the basis for the prosecution's request for the resentencing, the language of that statue cannot be construed to procedurally limit the fundamental right of a defendant in a criminal prosecution from appealing the result of a substantive sentencing proceeding held in his case, under Article 1, § 22. Thus, this Court could also treat this case as a direct appeal authorized as a matter of state constitutional right, as was originally

supposed.

On consideration, this Court should hold that the sentence violates our state constitutional prohibition against "cruel" punishment and reverse and remand for resentencing under Bassett. Assuming waiver of any procedural defect and application of the RAP 16.4 standards, because Mr. Ngoeung has not had any prior opportunity for judicial review of the issues, he need only show that he is suffering "restraint" and that restraint is "unlawful" as that term is defined in RAP 16.4. See In re the Personal Restraint of Isadore, 151 Wn.2d 294, 298-300, 88 P.3d 390 (2004). This is the standard the prosecution itself asserts. BOR at 8-9.

Further, the burden of proof is by a preponderance of the evidence. RAP 16.4(b) and (c); see In re Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

Even if direct appeal standards did not apply, Mr. Ngoeung has easily met the "preponderance" or "more likely than not" burden of proof, for both the "restraint" and "unlawfulness" requirements. A petitioner is under "restraint" if he is confined, under a "disability" as a result of a judgment and sentence in a criminal case or "has limited freedom because of a court decision. . . in a criminal proceeding." RAP 16.4(b); see also State v. S.M.H., 76 Wn. App. 550, 553, 887 P.2d 903 (1995). Further, disabilities such as the collateral consequences of a conviction, the post-custody supervision process, the potential effect of a conviction on future minimum sentences and difficulties with reestablishing oneself in society are all considered "restraint" for the purposes of RAP 16.4. See In re Powell, 92 Wn.2d 882, 887, 602 P.2d 711 (1979). Here, of course, Mr.

Ngoeung is not facing restraint from post-custody limits, but rather the restraint of being in prison for the rest of his life. He is more than "more likely than not" under restraint.

Further, the restraint is "unlawful" under RAP 16.4. That standard is met under RAP 16.4(c), which provides that restraint is unlawful if, *inter alia*,

> (2) The . . .sentence . . .entered in a criminal proceeding . . .was imposed or entered in violation of . . .the Constitution or laws of the State of Washington; or
>
> . . .
>
> (4) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding. . .and sufficient reasons exist to require retroactive application of the changed legal standard; or
>
> . . .
>
> (7) Other grounds exist to challenge the legality of the restraint of petitioner.

All of these grounds apply under Bassett, supra. In that case, this Court examined imposition of life without possibility of parole on a juvenile offender under the Miller fix statute, in light of the state constitutional prohibition against "cruel" punishment. Bassett, supra. Article I, § 14 provides, in relevant part, that "[e]xcessive bail shall not be required. . .nor cruel punishment inflicted." This provision provides greater protection to our citizens than the Eighth Amendment, which prohibits only those punishments which are both cruel *and* unusual. See, e.g., State v. Manussier, 129 Wn.2d 652, 674, 677, 921 P.2d 473 (1996); see also, State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996).

As a result, by definition, because the federal constitution has been interpreted as providing *less* protection than our state provision, anything which violates the federal provision will be deemed to have violated our state constitution as well. See Manussier, 129 Wn.2d at 674. But further, the fact that our state constitution is focused solely on "cruel" punishment without requiring that punishment to be "unusual" supports the conclusion that our state clause is more protective in this regard than is the federal constitution. Id.

In Bassett, this Court found that Article 1, § 14 creates a "categorical bar" against imposing life without the possibility of parole for even the most heinous of juvenile crimes. Slip op. at 9-11. The Court examined the sentencing practice itself, rather than using a proportionality analysis specific to the defendant's case. Slip op. at 19-21. Citing Ramos, supra, and Houston-Sconiers, supra, this Court noted that our state's highest Court has extended Miller's protections even beyond its holding in federal courts. Bassett, slip op. at 21-25.

In Ramos, the Bassett Court noted, the Supreme Court extended application of Miller "to juveniles sentenced for multiple homicides or to de facto life sentences." Bassett, slip op. at 22. Ramos also rejected the theory that individualized sentencing under Miller was limited to "single homicides," declaring that holding otherwise would "effectively prohibit the sentencing court from considering the specific nature of the crimes and the individual's culpability before sentencing a juvenile homicide offender to die in prison, in direct contradiction to Miller." Bassett, slip op. at 22-24, quoting Ramos, 187 Wn.2d at 438, 443.

More recently, in Houston-Sconiers, the Supreme Court extended the reasoning of Miller, holding that, under the Eighth Amendment prohibition against cruel and unusual punishment, "sentencing courts must have absolute discretion to depart as far as they want below the otherwise applicable ranges and/or sentencing enhancements when sentencing juveniles in adult court, regardless of how the juvenile got there." Houston-Sconiers,__ Wn.2d at __, 391 P.3d 409. Just as in Ramos, the extension occurred even though the U.S. Supreme Court had yet to reach this conclusion. Houston-Sconiers, __ Wn.2d at ___, 391 P.3d 409.

Of special note for this case, the Supreme Court applied Miller and found a right to an individualized Miller hearing for crimes *not* involving murder - even though the sentences in that case were 26 and 31 years - far less than "life without parole." Houston-Sconiers, __ Wn.2d at __, 391 P.3d 409.

In Bassett, this Court relied on these recent high court decisions and the greater protections of our state constitution, in light of the "special concerns inherent in juvenile sentencing" under Miller. Bassett, slip op. at 23. The Court then found that "societal standards of decency favor banning life without parole" for juvenile crimes. Bassett, slip op. at 23. The Court detailed a recent building of "national consensus against juvenile life without parole sentences," then turned to the difficulties in determining what very few juvenile homicides justified such a sentence. Bassett, slip op. at 24-26.

At that point, the Bassett Court pointed out that, even under the Eighth Amendment, the U.S. Supreme Court had admitted the serious

difficulty even expert psychologists had in making the required distinction "between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Bassett, slip op. at 27, quoting, Roper v. Simmons, 543 U.S. 551, 573, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005).

This Court then identified the "fundamental problem with our Miller-fix statute" - that the sentencing court is required to make a distinction which even expert psychologists have serious trouble making. Bassett, slip op. at 27-28. The Court went on:

> The sentencing court must separate the irretrievably corrupt juveniles from those whose crimes reflect transient immaturity - a task even expert psychologists cannot complete with certainty. Thus, the Miller-fix statute results in an unacceptable risk that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole or early release because the sentencing court mistakenly identifies the juvenile as one of the uncommon, irretrievably corrupt juveniles.

Slip op. at 28.

This risk was even more unacceptable given the different - and greater - protections in the constitution of our state. The Bassett Court then pointed out that, under the less-protective Eighth Amendment, life without parole for juvenile homicide offenders is supposed to be "uncommon" and "rare." Bassett, slip op. at 28-19. This leads to a logical conundrum - how can Washington's greater protections be enforced under our state constitution when to comport with those protections, life without parole sentences must be limited to "only the *most* uncommon and *rarest* of offenders?" The Court held that this is "an impossible determination for the sentencing court to make when faced with a juvenile offender,"

given all the revelations of Miller regarding the transient immaturities and weaknesses of youth. Bassett, slip op. at 28-29 (emphasis in original).

Further, the Court noted that the Miller factors themselves "provide little guidance for a sentencing court and do not alleviate the unacceptable risk" of unconstitutional sentencing, noting that the analysis asked for under those factors is "fraught with risks." Bassett, slip op. at 29. For example, this Court noted, how should a sentencing court consider either having a stable family and home or a history of horrendous abuse and no such home? Does the lack of such a stabilizing influence indicate profound wounds so great that hope of rehabilitation should be deemed minimal? Or should a court view the lack of such a home as proof that no chances were given and rehabilitation could be more likely? Bassett, slip op. at 29-30. This Court then held:

> In light of the speculative and uncertain nature of the Miller analysis, the Miller-fix statute creates a risk of misidentifying juveniles with hope of rehabilitation for those who are irretrievably corrupt. That is unacceptable under our State's cruel punishment proscription. For those reasons, life sentences without parole or early release for juvenile offenders as allowed under RCW 10.95.030(3)(a)(ii) are unconstitutional.

Bassett, slip op. at 29.

Bassett controls and compels reversal in this case. Just like in Bassett, here Mr. Ngoeung was ordered to serve not one but multiple life sentences without hope of parole or release. Further, under Bassett, such a sentence is *categorically* unconstitutional under the state constitution, regardless of the circumstances of the crime. Even so, the circumstances here cannot be deemed the "worst of the worst" - nor can Mr. Ngoeung.

In Bassett, the 16-year-old defendant got revenge after being kicked out by his parents by stealing a rifle, creating a makeshift "silencer," waiting a few days, then breaking into his home and shooting them dead. Bassett's friend, who was a year older, disabled the phone line before the attack and afterwards came in and shot Bassett's father in the head a second time when the man appeared to still be alive. After the shooting, Bassett or his friend then drowned Bassett's five-year-old brother in a bathtub to conceal their crime, and hid the bodies in various places, then cleaned the home. Bassett, slip op. at 2-4.

Here, as an accomplice who drove a car and never touched the weapon, Mr. Ngoeung got a *greater* sentence than the youth who shot the gun. And as an accomplice, his culpability is twice diminished from someone like Bassett. Yet the nature of the crimes was not well-thought out, planned in advance like in Bassett, but rather the very kind of impetuous, ill-thought out and rash violence which is exactly what Miller recognizes are the transient weaknesses of youth.

Bassett applies here. In re St. Pierre, 118 Wn.2d 321, 325-26, 823 P.2d 492 (1992). As the U.S. Supreme Court has held, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." Griffith v. Kentucky, 479 U.S. 314, 322, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Once a new constitutional rule is announced, the nation's highest court held, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." Id. Because the sentence imposed here is categorically unconstitutional, the restraint is unlawful

under RAP 16.4(c)(2) as "imposed or entered in violation" of the state constitution. Because he appealed from a resentencing, his case is still pending on review in this Court at the relevant time. Indeed, Mr. Bassett and Mr. Ngoeung are in essentially the same procedural posture. Mr. Ngoeung should not be deprived of the same result due to the language of RCW 10.95.035 trying to limit the right to appeal a resentencing to review only as a PRP.

Further, under RAP 16.4(c)(4), Bassett amounts to a "significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal proceeding" and there are sufficient reasons to apply the "changed legal standard" here. Like Mr. Bassett, Mr. Ngoeung's sentence to die in prison with no hope of release was in violation of the prohibition against cruel punishment. Mr. Ngoeung has more than sufficiently shown that he is suffering "restraint" and that the "restraint" is "unlawful" under Bassett's holding. This Court should so hold and should reverse.

2. ON REMAND FOR RESENTENCING, NEW COUNSEL SHOULD STILL BE APPOINTED

In his opening brief on appeal, Mr. Ngoeung raised a number of challenges to the decision of the resentencing court below, which included:

1) whether RCW 10.95.030(3) (the Miller "fix") creates a presumptive sentence of life with the possibility of parole, so that the imposition of life without that possibility was an exceptional sentence greater than that authorized by the jury's verdict, in violation of Mr. Ngoeung's rights to due process and trial by jury;

2) whether the resentencing court violated the Eighth Amendment or the greater protection of Article 1, section 14, fundamental rules of statutory construction and the mandates of Miller v. Alabma, 542 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), by imposing sentences of life without possibility of parole without properly considering the mitigating factors of youth,

3) Whether RCW 10.95.030, Miller and due process require the state to bear the burden of proving that a defendant was one of the very rare few who was so incorrigible that imposition of a sentence of life without the possibility of parole was constitutionally permissible,

4) Whether the resentencing court failed to properly apply the Miller factors at the resentencing,

5) Whether the resentencing court erred in holding that Miller did not apply to prohibit imposition of an "effective life" term of multiple sentences ordered to be served consecutively,

6) Whether appointed counsel at the resentencing were prejudicially ineffective under the Sixth Amendment and Article 1, section 22, for their failures at the resentencing, and,

7) Whether Mr. Ngoeung was entitled to resentencing before a new judge under the appearance of fairness doctrine.

Brief of Appellant ("BOA") at 1-2.

Ordering resentencing under Bassett with a prohibition against imposition of life without the possibility of parole and a mandate of considering the Miller factors in crafting a new sentence in light of Ramos and Houston-Sconiers will remedy the bulk of these questions and/or render them moot. The Supreme Court held in Ramos that it was not unconstitutional to shift the burden of proving lack of incorrigibility or "mitigating factors" to the defendant, thus answering that question. See Ramos, 187 Wn.2d at 423-25. But the Court also held that the Miller factors apply to sentencing even when dealing with more than one

homicide or stacking consecutive terms. Id. And in Houston-Sconiers, it extended the protections of the consideration of youth to allow discretion to go below even mandatory stacking sentencing enhancements even in the absence of a de facto life sentence, where no murder conviction was involved.

The only remaining questions here, then, because a resentencing is required, are whether counsel was prejudicially ineffective in their performance below and whether the new proceeding needs a new judge under the appearance of fairness doctrine.

Looking at Bassett gives an indication, again, of counsel's ineffectiveness in this case, below. Unlike here, in Bassett counsel submitted mitigating evidence, testimony, supporting documents and expert evaluations. Unlike here, in Bassett counsel made arguments at resentencing about the constitutionality of throwing away the key for a juvenile crime. And here, unlike in Bassett, the defendant had twice-diminished culpability as an accomplice rather than a principal to the crimes. Yet counsel did not raise those issues, make those same arguments, present that evidence or provide effective assistance. Based on the arguments presented more fully in Mr. Ngoeung's opening brief on appeal, on remand for resentencing under Bassett, new counsel is still required to ensure that Mr. Ngoeung will receive the representation to which he is entitled.

The question of appearance of fairness was also raised, due to the comments of the judge at resentencing below. Given the passage of time and clear mandates of the law and with respect to the Honorable Judge

who handled the resentencing, Mr. Ngoeung believes it is possible that, with counsel who perform their actual duties and present the law and advocate for him, the judge who was unable to properly consider the case in light of the Miller factors at the resentencing now years ago will follow the law as set forth in Ramos, Houston-Sconiers and this Court. He therefore leaves to this Court's discretion whether assignment to a new judge is required in order to avoid the violation of the appearance of fairness doctrine.

E. CONCLUSION

The sentence Mr. Ngoeung is serving is categorically unconstitutional under the "cruel punishments" clause of our state constitution. Bassett so holds and controls. This Court should reverse and remand for a new sentencing with new counsel in light of the changes in the law wrought by Bassett and the decisions in Ramos and Houston-Sconiers.

DATED this 11th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Supplemental Brief to opposing counsel VIA this Court's upload service, at pcpatcecf@ao.pierce.wa.us, and to appellant Mr. Nga Ngocung, DOC 738114, WSP, 1313 N. 13th Ave., Walla Walla, WA. 99362

DATED this 11th day of May, 2017.

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